IN THE SUPREME COURT OF THE UNITED STATES

(3)

A-2

LARRY GRANT LONCHAR,

Petitioner,

v.

A.G. THOMAS, Warden, Georgia Diagnostic & Classification Center,

Respondent.

No. 94-____
EXECUTION CURRENTLY SET FOR 7 P.M. JUNE 29, 1995

ORIGINAL

MOTION FOR A STAY OF EXECUTION

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MOTION FOR A STAY OF EXECUTION

TO THE HON. ANTHONY KENNEDY, JUSTICE, GREETINGS:

COMES NOW, PETITIONER, and respectfully moves that this Court stay the death warrant entered by the Georgia trial court. In support of this motion, Petitioner states as follows:

I. STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death in DeKalb County, Georgia. His conviction and sentence were affirmed by the Georgia Supreme Court. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988). Mr. Lonchar subsequently allowed counsel to file a petition for a writ of certiorari to this Court, which was denied. Lonchar v. Georgia, 489 U.S. 1019, 109 S. Ct. 818, 103 L. Ed. 2d 808 (1989). A petition for rehearing was also filed and denied. Lonchar v. Georgia, 489 U.S. 1061, 109 S. Ct. 1332, 103 L. Ed. 2d 600 (1989).[1]

Larry Lonchar filed a petition for a writ of Habeas Corpus in Butts County, Georgia, on June 23, 1995. This was dismissed, and a certificate of probable cause denied by the Georgia Supreme Court. He immediately filed his first (and, to date, only) Federal Petition for a Writ of Habeas Corpus in the Northern District of Georgia. The Court held a hearing, denied Respondent Thomas' motion to dismiss, and entered a stay of execution.

Respondent moved to vacate the stay. This was granted this afternoon, effective at 5 p.m. The opinion of the Eleventh Circuit Court of Appeals is to be found at Lonchar v. Thomas, ___ F.3d ___ (11th Cir. 1995) (not yet reported; attached as *Exhibit A*). Mr. Lonchar is currently scheduled to be executed at 7 p.m.

It is worth remembering that this is a man who has serious mental problems, and who has been found to suffer from profound depression. This should be borne in mind in the rush to execute him because radical assumptions made in the Eleventh Circuit opinion.

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1. In proceedings that are related to this case, a state habeas court dismissed a next-friend petition for lack of standing, and the Supreme Court of Georgia affirmed. See Kellogg v. Zant, 260 Ga. 182, 390 S.E.2d 839, cert. denied, 111 S. Ct. 231, 112 L. Ed. 2d 191, reh. denied, 111 S. Ct. 573, 112 L. Ed. 2d 579 (1990). The same next-friend sought relief from the Federal District Court, which also dismissed the petition. Kellogg v. Zant, 1:90-CV-2336-JTC (N.D.Ga. 1992), aff'd, Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992). A second next-friend petition was likewise dismissed through the state and federal system last week.

II. THE ELEVENTH CIRCUIT'S OPINION

The Eleventh Circuit vacated the stay on the basis of "abuse of the writ," and was not concerned whether "we view this case as one in which Lonchar has abused the writ . . . or simply involv[ed] abusive conduct and misuse of the writ." *Exhibit* A, at 7. Regardless of this lack of concern, one thing is clear--the Court cites no rule (neither Rule 9(a) nor Rule 9(b) has even been invoked by the State) and no case that supports the proposition that there can be abuse of the writ on a first petition under the circumstances of this case.

If ever there were a case where reasonable jurists could differ, this is it. Judge Camp is certainly not known for being a liberal judge, although he is a fair one. He is also a reasonable jurist. Reasonably enough, he found no legal authority to support the denial of a stay. Since that is far beyond the showing that is required to enter a stay, a stay was properly entered by Judge Camp. The Eleventh Circuit should not have disturbed it.

III. JUDGE CAMP'S STAY ORDER WAS ENTIRELY APPROPRIATE

The only question before this Court is whether a stay is appropriate. Because of the obviously drastic results of the denial of a stay, and the relatively insignificant prejudice to the State when a stay is granted, the burden rested on the Warden to show the Eleventh Circuit Court of Appeals "that the issues [presented in the petition] are [not] debatable among jurists of reason," or that the issues presented "are [not] 'adequate to

deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citations omitted).

The Warden simply cited no case that comes close to suggesting that Mr. Lonchar should be denied a stay. The "novel" rule of habeas corpus litigation proposed by the Warden essentially asks this Court to spontaneously and judicially create a bar to habeas corpus relief that goes far beyond Rules 9(a) and 9(b) to the Rules Governing Habeas Corpus Actions. This bar would be one that has no precedent in the law, and that was never announced to Larry Lonchar as a litigant to give him fair notice of the hidden barrier reef that might sink his entirely legal ship.

The record indicates that Larry Lonchar has been told by State Court Judge Connelly, by Federal District Judge Camp, by counsel and--periodically--by counsel for the Warden[2] that relief would be available should he elect to proceed with his appeals. It would be fundamentally inequitable to create a novel rule now in the heat of

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2. Counsel for the Warden seemed to shift another position yesterday announcing that no such assurance had been made with respect to federal court. However, in state court counsel announced that there had been no "specific waiver on the record in any particular proceeding." (6/23/95 Hrg. at 21) (emphasis supplied) To the extent that counsel now argues that there was such a waiver in federal court, counsel apparently refers to the prior federal proceedings where Judge Camp discussed the possibility of Mr. Lonchar's "waiv[ing] any appeals on [his] behalf in federal court or otherwise." (11/14/91 Hrg. at 437) (emphasis supplied) It would seem that this would, were it really a waiver, operate in both state and federal court. However, it would seem still clearer that there was no such waiver since Judge Camp went on to advise Mr. Lonchar that "you can change you mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." Id. at 443.

the moment that would result in the execution of Larry Lonchar within hours.

IV. A STAY MUST BE GRANTED WHERE VARIOUS ISSUES EXIST ON WHICH REASONABLE JURISTS COULD EITHER DIFFER, OR COULD ONLY RULE IN PETITIONER'S FAVOR

There are any number of reasons that compel a stay of execution in this case.

A. WITHOUT MORE ADO, THIS COURT SHOULD FIND THE ISSUE CONTROLLED BY COLLINS v. BYRD

If there were ever any question about it, disposition of this Stay application would be controlled by Collins v. Byrd, 114 S. Ct. 1288 (1994). Byrd had not filed his federal petition for eleven years after the crime (compared to the nine years in this case). The state sought to argue that this would provide the basis for Rule 9(a)'s prohibition against "inexcusable delay," an issue not even argued by Warden Thomas in this case. The Sixth Circuit stayed the case, and the State sought review from this Court.

Eight justices deemed the issue so clear that they did not find any need at all to comment on the summary denial of the State's motion. Justice Scalia concurred with their Rule 9(a) analysis:

> We have for many purposes . . . abandoned (or forgotten) the equitable nature of habeas corpus, and under the current state of our law I cannot say that it would have been unlawful or an abuse of discretion for the Sixth Circuit to require District Court consideration of the habeas corpus petition on its merits, and to say the execution pending that consideration.

Id. at 1288 (opinion of Scalia, J.).[3] The ruling of the Eleventh Circuit to the contrary is not supported by the law.

In this case, the effort to execute Larry Lonchar with an excess of expedition threatens this Court with indigestion. Before even chewing on the first bite of Federal Habeas Corpus review, this Court has been asked to swallow Mr. Lonchar, his constitutional rights, Great Writ and all. As with apples, serious issues surrounding the life and death of a mentally ill inmate on death row call for deliberate digestion.

Petitioner is not seeking any unnecessary delay in this case. In fact, Petitioner is further along in his post-conviction remedies than any other similarly-situated inmate on Georgia's Death Row.[4] In arguing for the dismissal of fundamental constitutional claims, "the State's position would be particularly difficult where--as in the present case--a determination has not yet secured a determination on the merits of [any of] his claims." Potts v. Kemp, 764 F.2d 1369, 1371 (11th Cir. 1985). The State's position is particularly difficult here, as it was in Collins v. Byrd. The same result should apply, and the execution be stayed.

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3. Justice Scalia's only dissent from the Sixth Circuit's order concerned the timetable and other impositions leveled at the District Court, which he considered "a plain abuse of discretion, if not entirely *ultra vires*." Id. at 1289.

4. As discussed below, 16 inmates on Georgia's Death Row whose death sentences were affirmed prior to Mr. Lonchar's are not yet in federal court, and every single one of the 36 inmates (one of whom has two death sentences from separate trials) who had their death sentences affirmed on direct appeal since that date has yet to reach federal court.

B. THE ELEVENTH CIRCUIT WOULD BE CLEARLY WRONG TO APPLY RULES 9(A) AND 9(B) WHEN RESPONDENT HAS NEVER PURPORTED TO RELY UPON RULE 9(A), AND WHEN THE WARDEN HAS NOW SAID THAT HE DID NOT INTEND EVER TO RELY ON RULE 9(B)

It is not clear what authority the Eleventh Circuit found to dismiss this habeas corpus case. The rules governing these cases clearly express the definition of "abuse of the writ." There is no case that extends another "abuse" rule beyond Rule 9(a) and Rule 9(b).[5]

While there have been some shifting sands in the positions taken by the Warden, all along the State has refused to rely on Rule 9(a) in arguing to vacate the stay.[6] After recognizing that Rule 9(b) was facially inapplicable,[7] the Warden has now insisted that he never intended to rely on this argument either:

> Respondent moved to dismiss the petition, not under the principles of Rule 9(b) or Rule 9(a), but based on the equitable principles governing habeas corpus actions.
>
> * * *
>
> Although Respondent raised laches below to avoid waiving that defense should particularized prejudice become apparent in addressing the merits of any issues, the Rules Governing Section 2254 Cases were not the basis for Respondent's argument. Respondent does not assert that he has shown particularized prejudice, but that the delay should be considered in evaluating the equities in this case.
>
> Respondent also has not relied on Rule 9(b), but again, on the equitable principles cited by the district court and in the pleadings below.

See *Emergency Motion (in the Eleventh Circuit) to Vacate Stay of Execution, at 4 & 10 (filed June 29, 1995)* (emphasis supplied) (hereinafter referred to as *Warden's XI Motion*).

The Eleventh Circuit was therefore barred from predicating a dismissal on these rules. As Professor Liebman has noted, the traditional rule was that abuse of the writ was an affirmative defense to be claimed by the State. "Any doubts about the vitality or significance of the traditional rule . . . were laid to rest by the Supreme Court's 1991 decision in *McCleskey v. Zant*." See Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Vol. 2, at 911 (2d Ed. 1994) (citing McCleskey v. Zant, 111 S. Ct. 1454 (1991)). The Supreme Court clearly held that "the government bears the burden of pleading abuse of the writ." Id. at 1470.

What was formerly the majority rule--that a federal court should not raise the issue of abuse *sua sponte*--is now generally seen as the only rule. See Liebman, *op cit. supra*, at 911-12. Any Eleventh Circuit ruling to the contrary would be contrary to the law. Certainly, it cannot be said that every reasonable jurist would rule against the law. A stay is therefore appropriate.

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5. Gomez v. United States District Court, 112 S. Ct. 1652 (1992), the only case that comes remotely close to discussing the "equity" argument subsequently critiqued by Justice Scalia in Collins v. Byrd was, of course, and § 1983 case brought by an inmate who had enjoyed multiple habeas petitions prior to that point. It was not governed by the Rules Governing § 2254 Cases.

6. It is important to note that the State has not even *attempted* to prove the requisite prejudice to meet the requirements of Rule 9(a) and that issue is simply not before the Court at this time. See *State's Motion to Dismiss, at 24* (requesting a hearing on prejudice if the question of Rule 9(a) is deemed to have any merit). For reasons set out below, it is clear that no such showing of prejudice could be made.

7. The pleadings from the District Court have been lodged with this Court and Petitioner will not reiterate all of them. Suffice it to say any reasonable jurist would agree that under current law Rule 9(b) has no application to this case.

C. THE ONLY AVENUE LEFT TO WARDEN THOMAS IS THEREFORE THE NOVEL AND AMORPHOUS "EQUITY EXCEPTION" TO THE WRIT OF HABEAS CORPUS PROPOSED BELOW, WHICH FINDS NO LEGAL SUPPORT AMONG REASONABLE JURISTS AT ALL

After recognizing that neither Rule 9(a) nor Rule 9(b) is applicable, the Warden was reduced solely to a novel proposition that there should be another judicial exception to the right to habeas corpus relief, based on the Warden's amorphous "principles of equity." See *Warden's XI Motion, at 9*. The Warden concedes "the unavailability of a case directly on point." *Id.* In fact, the Warden does not suggest a case peripherally on point, but cites only to cases that deal with Rule 9(b). To analogize to the equity required of state courts, before it can be applied to bar relief a "procedural rule must be 'clearly announced to defendant and counsel.'" Wheat v. Thigpen, 793 F.2d 621, 625 (5th Cir. 1986) (quoting Henry v. Mississippi, 379 U.S. 443, 448 n.3, 85 S. Ct. 564, 567 n.3, 13 L. Ed. 2d 408 (1965)). Petitioner had no forewarning that this novel rule might be sprung on him.

1. NO REASONABLE JURIST--LET ALONE ALL OF THEM--WOULD POSIT THAT SUCH A RULE CURRENTLY EXISTS

First, prior to the Eleventh Circuit opinion, no jurist had announced such a proposition. Second, as discussed above, Justice Scalia expressly noted the lack of support for this "rule" in Collins v. Byrd. Third, such a rule was specifically rejected by Congress when *28 U.S.C. § 2254* was enacted. See, e.g., Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("Congress indicated its disfavor for dismissals for delay under Rule 9(a) by eliminating from the proposed draft of the rule a rebuttable presumption of

prejudice that could be invoked by the state after a delay of five years.").

And fourth, any such "rule, it has been suggested, would risk violating the constitutional provision forbidding suspension of the writ except in times of war or rebellion." Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Vol. 2, at 702-03 (2d Ed. 1994) (citing authorities); see also id. at 181 n.66 (quoting Alexander Hamilton); Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("[l]iberal construction [of Rule 9(a)] also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution").

Certainly, where the questions involved would seem to be so weighty, there is no authority to vacate a stay and fashion a novel rule on a couple of hours' notice and with forty-five minutes permitted for briefing. Again, while few reasonable jurists would admit the existence of Warden Thomas' novel "rule of law," certainly a stay should be granted prior to adopting it.

2. REASONABLE JURISTS SHOULD CERTAINLY PAUSE BEFORE PREDICATING SUCH A RULE ON THE PURPORTED INTENTIONS OF THE LITIGANT IN FILING A PATENTLY MERITORIOUS PETITION FOR FEDERAL HABEAS CORPUS RELIEF

Warden Thomas has argued--with undeniable imagination--that one focus of this novel rule of equity should be why Larry Lonchar plans to litigate his federal constitutional rights. The Eleventh Circuit adopts this argument, opining without any support in the petition that "Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his

execution, not to vindicate his constitutional rights." See Exhibit A, at 7.

This is simply not the case. The unrebutted testimony in the lower court was that Larry Lonchar did wish to vindicate his constitutional rights. What does the Eleventh Circuit suggest? That when Larry Lonchar said that he meant to challenge his conviction and sentence, he actually meant that he did not? That a waiver may be found beyond a reasonable doubt when the petitioner expressly says that he does not mean to waive his rights? This is a novel rule of law indeed. Cf. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (State must bear burden of showing waiver "made with a full awareness both of the right being abandoned and the consequences of the decision to abandon it").

Larry Lonchar had previously seen no worthwhile reason to avoid death. Now he has finally seen that his litigation could achieve broader purposes than to save his own life. This does not, of course, mean that he is insincere about winning his case. Indeed, he explicitly agreed to litigate all issues presented:

> Q. Let me ask you this, Mr. Lonchar. You, your attorneys, have filed a petition in court that contains 59 pages, and you signed the verification that you have personal knowledge of the allegations in the Petition for Writ of Habeas Corpus, and that they are true and correct, and that you seek the relief requested in there. Did you sign that verification, I assume?
>
> A. Yes, Your Honor.
>
> * * *

> Q. Now, I understand your point with regard to the question of the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?
>
> A. That's correct.
>
> Q. Now, a great deal of the petition goes far beyond that, and alleging irregularities and violations of your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. It is your wish to pursue those claims through a petition for Federal Habeas Corpus Relief? Do you understand my question.
>
> A. Yes, Your Honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.

(F.H.T. at 18-19)

Judge Camp felt that Mr. Lonchar's major motivation behind his litigation was to use his case as a vehicle for systemic change, to abolish the Electric Chair and provide inmates on Death Row with an option to save other lives, if in fact their executions could not be averted. Judge Camp explicitly did not find, however, that this vitiated the good faith with which the rest of the petition was to be litigated. Such a finding would have been entirely insupportable.

While the Warden does advert to this in passing as an element of his novel rule, it should be emphasized that Larry Lonchar's motives in litigating all the issues in his case are not relevant to what the outcome will actually be. On the face of the petition, it would probably be true to say that he has more chance of winning

the challenge to his conviction than to change the method of execution.[8]

It is true, but entirely irrelevant to the merits of the claims, that Larry Lonchar filed his 1993 state habeas petition to avoid his brother's suicide. (F.H.T. at 19) Now, one precipitant for Mr. Lonchar going along with his appeals is that he sees some chance that his litigation will help others, "all of these people's lives involved. . . ." (F.H.T. at 21) In another case, it might be that a petitioner believed that his mother would be happy at his pursuing his appeals. In another case, his motivation might be his desire to watch the N.B.A. finals for many years to come. These motives are simply not relevant to whether there is merit to the claims presented, and whether the claims may result in one type of relief (changing the method of execution) or another (vacatur of his convictions and sentences) is not relevant to the fact that such relief is being sought.

Certainly, it must be said that reasonable jurists should think long and hard before prying open the attorney-client privilege to ascertain why a petition is filed for habeas corpus relief. Professor Liebman has published two volumes on habeas corpus

8. That is not to say, of course, that counsel's advice that pending litigation could precipitate political change would be false. However, clear precedent from this Court indicates that Mr. Lonchar will also, or alternatively, receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "*Diaz* and *Hopt* . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

litigation, and finds no reported decision has yet made this an element of the analysis. Reasonable jurists should pause before doing so, too.

D. REASONABLE JURISTS COULD (AND CERTAINLY WOULD) FIND THAT RULE 9(A) HAS NO APPLICATION TO THIS CASE, EVEN WERE THE WARDEN TO ASSERT PREJUDICE FROM LARRY LONCHAR'S ACTIONS

Although he has never pressed his Rule 9(a) arguments, the Warden seems to be arguing that Larry Lonchar achieved some "strategic or tactical advantage" by filing his federal habeas petition within minutes of the denial of his state proceedings. If this were true, Larry Lonchar would be an inadequate strategician, or a bad tactician.

Larry Lonchar's case was affirmed on direct appeal on July 13, 1988. See Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488 U.S. 1019 (1989). There are a total of sixteen inmates on Georgia's Death Row whose death sentences were affirmed prior to that date, and who are not in federal court. There are a total of 36 inmates (one of whom has two death sentences from separate trials) on Georgia's Death Row who have had their death sentences affirmed on direct appeal since that date, and none is in federal court. It is clear, then, that Larry Lonchar's actions have not only failed to prejudice the State by delaying his litigation, but they have resulted in the most expeditious consideration of any person currently in Warden Thomas' custody.

It is very clear that Larry Lonchar has neither intended to secure such an advantage, nor has he in fact done so. Even were

Warden Thomas to argue that Rule 9(a) applied to this case, and plead specific prejudice, he would not prevail.

E. REASONABLE JURISTS COULD (AND CERTAINLY WOULD) FIND THAT RULE 9(B) HAS NO APPLICATION TO THIS CASE, EVEN WERE THE WARDEN TO ASSERT THIS DEFENSE

It would be a very strained interpretation of Rule 9(b) that would apply it to this case.

1. REASONABLE JURISTS WOULD FIND THAT RULE 9(B) HAD NO APPLICATION TO THIS CASE SINCE THIS IS NOT A SUCCESSIVE CLAIM FOR RELIEF

The State of Georgia has admitted, and the District Court found, that: 1) this is Mr. Lonchar's first federal Petition for a Writ of Habeas Corpus; and 2) Mr. Lonchar has not previously had a hearing on the merits of the claims set forth in this petition in the federal courts. The State has now conceded that Rule 9(b) has nothing to do with this case.[9]

On its plain face, Rule 9(b) simply does not apply to this case:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b), Rules Governing Section 2254 Cases (emphasis supplied).

There has been no prior petition filed by Larry Lonchar in this case. Neither has there been any "prior determination . . . on the merits" of any of his claims. Rule 9(b) simply has no application to this case.

Throughout Respondent's motion to dismiss, reference was made to waiver of the right to a hearing "on a successive application" for federal habeas relief. *Respondent's Motion, at 9* (quoting Darden v. Dugger, 825 F.2d 287, 294 (11th Cir. 1987) (emphasis supplied). The Potts case was likewise a successive petition, where Potts had previously dismissed his own federal pleadings. See Potts v. Zant, 638 F.2d 727, 740-41 (5th Cir. Unit B, 1981). In the case upon which Respondent has placed primary reliance--McCleskey v. Kemp, 111 S. Ct. 1454 (1991)--the Court dealt with McCleskey's "second federal habeas petition." Id. at 1457.

Unless counsel's preliminary research proves to be way off the mark, this Court will find no case that has ever applied Rule 9(b) to the first petition for federal relief filed by any inmate, much less one under sentence of death. This Court will likewise find no case that has ever applied Rule 9(b) to a petition filed by the inmate after the denial--not on the merits of any issue--of a next-friend's petition (opposed rather than authorized, by the inmate) for lack of standing.

Reasonable jurists would find that Rule 9(b) has no bearing on this case. Any contrary ruling would flout the law as we know it.

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9. The doctrine of abuse, based on the analogous state law prohibition of successive petitioner, was never even argued in state court, although Mr. Lonchar had previously filed and dismissed a state habeas petition. The provisions of state law are indistinguishable from Rule 9(b)--claims will be barred unless the court "finds grounds for relief asserts therein which could not reasonably have been raised in the original . . . petition." *O.C.G.A. § 9-14-51*. This was not even pled in state court, let alone found.

2. **REASONABLE JURISTS WOULD NOT HOLD LARRY LONCHAR TO ACCOUNT FOR THE ACTIONS OF HIS "NEXT FRIEND" WHO ACTED WITHOUT HIS AUTHORIZATION AND WHO WAS FOUND TO HAVE NO STANDING TO FILE ANYTHING**

There is no case that holds a Petitioner to account for the actions of an unauthorized "next friend" who takes steps that are actively opposed by the inmate. This is for obvious reasons: Assume for one moment that Mr. Lonchar's sister hated him, rather than loved him, and filed a "federal petition" before the exhaustion of state court remedies. Could this unauthorized action lead to the dismissal of the first real federal petition that Mr. Lonchar might later file? Of course not. Merely because his sister purported to have his best interests at heart, this would not justify imputing her allegations to him.

Indeed, the focus must be on federal litigation, there never was a prior petition filed by a person with standing, and the federal petition in question here was filed within 24 hours of the exhaustion of such remedies as the State of Georgia saw fit to provide.[10] There is no case that holds that the prior unauthorized petitions bar Mr. Lonchar now.

Certainly, this is something on which reasonable jurists could differ, if they did not all side with Petitioner. Such authority as there is that discusses the issue supports Petitioner's position. In Potts the Eleventh Circuit suggested that there was a problem with "reliance on evidence presented in a [next-friend] suit to which Potts was not a party. We conclude the court erred in relying on evidence presented in the 'next friend' hearing and that such error requires a remand." Potts v. Zant, 638 F.2d 727, 750 (5th Cir. Unit B, 1981).

10. If Mr. Lonchar had "adopted" the federal next-friend petition that someone else filed, he would not have been able to secure federal relief at that time. Rather, he would have been sent back to state court to exhaust his claims, since he had never completed his first state court post-conviction proceeding. He has only now done so, and he cannot be legally faulted for not bringing his federal petition before Monday--immediately upon exhaustion of his state court remedies.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court enter an order staying Larry Lonchar's execution pending the filing and disposition of a Petition for a Writ of Certiorari in this case.[11]

Respectfully Submitted,

BY: _____

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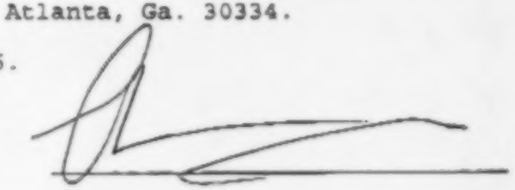
11. Counsel is working on such a petition now. However, with such weighty issues there clearly has not been time to do this in the minutes since the announcement of the extraordinary ruling of the Eleventh Circuit.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing pleading upon Mary Beth Westmoreland, Assistant Attorney General, 132 Judicial Building, Atlanta, Ga. 30334.

This 29th day of June, 1995.



A-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

PUBLISH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 29 1995
MIGUEL J. CORTEZ
CLERK

No. 95-8821

LARRY GRANT LONCHAR,

Petitioner-Appellee,

versus

ALBERT G. THOMAS, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, Chief Judge, COX and DUBINA, Circuit Judges.

B Y T H E C O U R T:

Albert Thomas, warden of the Georgia Diagnostic and Classification Center, has filed an emergency motion to vacate the district court's indefinite stay of the execution of Larry Grant Lonchar. Lonchar has responded to the motion. For the reasons given below, we vacate the stay.

I. Procedural History

An explanation of our ruling must begin with a review of the procedural history of Lonchar's case.[1] Lonchar's conviction for murder and sentence of death were affirmed on direct appeal in July 1988, and the Supreme Court denied certiorari in January 1989. Lonchar v. State, 369 S.E.2d 749 (Ga. 1988), cert. denied, 488 U.S. 1019 (1989). Lonchar refused to file a collateral attack on his own, and his execution was scheduled for March 1990. His sister, Chris Kellogg, then petitioned a Georgia superior court for habeas corpus. Finding Lonchar competent to bring a petition on his own, the superior court dismissed the petition for lack of standing. The Georgia Supreme Court denied a certificate of probable cause to appeal the decision. Kellogg v. Zant, 390 S.E.2d 839, cert. denied, 498 U.S. 890 (1990). Lonchar's sister then filed a 28 U.S.C. § 2254 petition in federal district court. Finding after a full evidentiary hearing that Lonchar was competent, the district court dismissed the petition for lack of standing, and this court affirmed. Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992), cert. denied, 113 S. Ct. 1378 (1993). Lonchar opposed the petition and so stated before the federal district court.

Following the failure of his sister's petitions, the State scheduled Lonchar's execution for February 24, 1993. That day, Lonchar consented to the filing of a petition for habeas corpus in his own name in Georgia superior court. The superior court stayed

[1] This procedural history is taken from records on file in this court from this and prior proceedings.

the execution. A few months later, Lonchar sought to dismiss the petition. Finding Lonchar competent to waive his rights, the superior court dismissed the petition without prejudice. The Georgia Supreme Court denied Lonchar's attorneys' motion for certificate of probable cause to appeal.

On June 8, 1995, an execution order was entered for Lonchar's execution between noon Friday, June 23, 1995 and noon Friday, June 30, 1995. The execution was scheduled for 3:00 P.M., June 23, 1995. On June 20, 1995, Lonchar's brother, Milan Lonchar, Jr., sought habeas relief on Lonchar's behalf. After a hearing at which Lonchar declared his opposition to the petition and his wish to die, the Georgia superior court found Lonchar competent and dismissed the petition for want of standing. Lonchar v. Thomas, No. 95-V-128 (Super. Ct. Butts County June 21, 1995). The Georgia Supreme Court denied Lonchar's brother a certificate of probable cause to appeal. Lonchar's brother was similarly unsuccessful in federal district court. Lonchar v. Thomas, No. 1:95-CV-1600-JTC (N.D. Ga. June 22, 1995). On June 23, this court denied a certificate of probable cause to permit his brother to appeal the dismissal. Lonchar v. Thomas, No. 95-8799 (11th Cir. June 23, 1995). The U.S. Supreme Court denied certiorari. Lonchar v. Thomas, No. 94-9773 (U.S. June 23, 1995).

On June 23, however, the day his execution was scheduled, Lonchar again--as he had on the day of his scheduled execution in 1993--consented to the filing of a petition for habeas corpus in his name and a complaint under 42 U.S.C. § 1983. The Butts County

Superior Court temporarily stayed the execution. At a hearing in Butts County, Lonchar informed the judge that he did not want a writ of habeas corpus. (Tr. of 6/23/95 hr'g at 6-7.) Lonchar explained that he still wished to be executed, but he hoped to delay the execution long enough for the Georgia legislature to consider changing Georgia's method of execution from electrocution to lethal injection, so that Lonchar could donate his organs. (Id.) The state court dismissed the habeas petition on June 26, 1995, essentially finding that it was an abusive writ brought for manipulative purposes. Lonchar v. Thomas, Nos. 95-V-332, 335 (Super. Ct. Butts County June 26, 1995). On June 27, the Supreme Court of Georgia denied Lonchar's application for a certificate of probable cause to appeal the dismissal. Lonchar v. Thomas, Nos. S95R1545, S95M1512 (Ga. June 27, 1995).

Lonchar's execution was rescheduled for 3:00 P.M. June 28, 1995. On June 27, Lonchar filed in his own name a 28 U.S.C. § 2254 petition in the district court. The State moved to dismiss the petition. The district court first temporarily stayed the execution to consider the State's motion; later on June 28 the court entered an indefinite stay to reach the merits of the petition. Lonchar v. Thomas, No. 1:95-CV-1656-JTC (N.D. Ga. June 28, 1995). In the order granting the stay, the district court found that Lonchar has twice waited until the day of execution--despite having ample time before--to seek relief. The court also found that Lonchar not only neglected to seek relief, but explicitly refused in open court to do so. Finally, based on

Lonchar's statement at the hearing on Lonchar's petition, the court found that

> [Lonchar's] purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

(Order at 7.)

The district court concluded that Lonchar's conduct was an abuse of the writ. However, because this § 2254 petition is Lonchar's first, the court felt constrained by this court's precedent to deny the State's motion to dismiss for abuse of the writ. The court therefore denied the motion and granted a stay of execution. The State now moves this court to vacate that stay.

II. Discussion

The writ of habeas corpus is governed by equitable principles, and the petitioner's conduct may thus disentitle him to relief. Sanders v. United States, 373 U.S. 1, 17, 83 S. Ct. 1068, 1078 (1963); Gunn v. Newsome, 881 F.2d 949, 954 (11th Cir. 1989) (en banc). Even when the petitioner follows procedural rules, the writ comes at a cost to finality and state sovereignty. McCleskey v. Zant, 499 U.S. 467, 496, 111 S. Ct. 1454, 1469-70 (1991). A petitioner's willful delay and manipulation of the judicial system exacerbate this cost. Thus,

> [e]quity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. . . . A court may consider the last-minute nature of an

application to stay execution in deciding whether to grant equitable relief.

Gomez v. United States Dist. Court, ___ U.S. ___, 112 S. Ct. 1652, 1653 (1992). This is the case even apart from the subsequent-petition doctrine of abuse of the writ embodied in Rule 9 of the Rules Governing Section 2254 Petitions and addressed by McCleskey. The Gomez court made this clear: "Even if we were to assume . . . that [the petitioner] could avoid the application of McCleskey to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy." Id. at 1653. The equitable remedy of habeas therefore carries with it equitable doctrines, including the possibility that a petitioner's egregiously abusive conduct can bar relief even if it is the first time he seeks such relief.

The district court acknowledged these principles, but it believed that Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987), controlled the result in this case. We disagree. Even assuming that Davis remains good law after Gomez, it does not govern this case. In Davis, the State contended that the filing of a petition on the eve of execution by itself constituted an abuse of the writ. This court held "only that the fact that a scheduled execution is imminent does not itself create a basis for dismissing the petition as an abuse of the writ." Id. at 1521. The court based its holding exclusively on Rule 9 of the Rules Governing Section 2254 Cases; the court did not consider whether equitable doctrines

independent of Rule 9 permit a court to refuse to tolerate egregious abuse.[2]

Based on the principles of equity and the caselaw cited above, we view this case as one in which Lonchar has abused the writ. We need not be detained, however, by a debate over whether this case is properly characterized as one involving an abuse of the writ or simply a case involving abusive conduct and misuse of the writ. However the case is characterized, the district court findings show that Lonchar does not merit equitable relief. First, Lonchar has offered no good reason for his six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition. Second, Lonchar presents no good excuse for his manipulative practice of consistently waiting until his day of execution to seek relief. Finally, Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his execution, not to vindicate his constitutional rights. As was the case in Gomez, "abusive delay . . . has been compounded by last-minute attempts to manipulate the judicial process." Id.

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[2] Davis in fact presented no case of egregious abuse. Although over a year passed between the U.S. Supreme Court's denial of certiorari on the direct appeal and Davis's first state collateral attack and § 2254 petition, this one-year delay was well within Florida's statute of limitations on state collateral relief. Davis, 829 F.2d at 1520 n.18. Furthermore, Davis had not been totally inactive; he had petitioned the state for clemency. Id. at 1520. The last-minute filing in Davis appeared to result more from Florida's conduct in scheduling an execution before Davis had an opportunity to seek collateral relief than from Davis's willful refusal to seek relief, as is the case here.

III. Conclusion

The district court granted a stay of execution based on the erroneous conclusion that it could not dismiss the petition for Lonchar's abusive conduct. Because its granting of the stay was thus based on an erroneous determination of law, it was necessarily an abuse of discretion. Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 694 (11th Cir. 1995). We accordingly VACATE the stay of execution.

Our mandate shall issue at 5:00 P.M. Eastern Daylight Time today.

STAY VACATED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Larry Grant Lonchar,

Petitioner,

v.

A.G. Thomas, Warden
Georgia Diagnostic and
Classification Center,

Respondent.

CIVIL ACTION FILE NO.
1:95-CV-1656-JTC

ORDER

Petitioner's sentences of death were affirmed on direct appeal. At the time of the first scheduled execution, a full round of next-fiend petitions were brought which were denied for lack of standing in the state and federal courts.

Just prior to his execution in 1993, Petitioner agreed to file a state habeas action. This action was dismissed, without prejudice, pursuant to the Petitioner's request.

A second round of next-friend petitions were filed, which were denied in both the state and federal courts for lack of standing. Hours prior to the execution, Petitioner filed a full state habeas action. Judge Smith of the Superior Court of Butts County denied the petition, essentially finding that it was an abusive writ brought for manipulative purposes.

This matter now comes before this Court on the first habeas petition filed by Petitioner. Normally a prisoner is entitled to federal review of the conviction and sentence for errors of a constitutional magnitude. The petition presents significant constitutional issues concerning the validity of

Petitioner's trial and sentence. None of these issues have been reviewed in an federal court proceeding. The State maintains Petitioner is precluded from filing his Petition because his actions have amounted to an abuse of the writ of habeas corpus. Petitioner, in this instance, may have waived the right to review. However, the issue of waiver requires further consideration. In view of the irrevocability of the death penalty, the Court **GRANTS** a temporary stay of execution so that this issue can be carefully considered. The State is **HEREBY ORDERED** to immediately **STAY** the execution of Larry Grant Lonchar until further order of this Court.

SO ORDERED, this 28 day of June, 1995.

FOR JACK T. CAMP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Larry Grant Lonchar,	
Petitioner,	
v.	**CIVIL ACTION FILE NO. 1:95-CV-1656-JTC**
A.G. Thomas, Warden Georgia Diagnostic and Classification Center,	
Respondent.	CAPITAL CASE

ORDER

This action is presently before the Court on Petitioner's Petition for Writ of Habeas Corpus; on Petitioner's Motion for Stay of Execution; on Petitioner's Motion for Evidentiary Development; and on Respondant's Motion to Dismiss.

I. STATEMENT OF CASE

Following a jury trial in Dekalb County Superior Court, Larry Grant Lonchar [hereinafter "Lonchar"] was convicted on three counts of malice murder for his participation in the deaths of Charles Wayne Smith, Steven Smith and Margaret Sweat. He was also convicted of aggravated assault, which occurred during the same incident as the murders, on Charles Richard Smith. Lonchar was sentenced to death by electrocution for the three murder convictions and was sentenced to twenty years on the aggravated assault conviction.

The sentences were automatically reviewed, pursuant to Georgia's automatic appeal procedure, and were affirmed. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488

U.S. 1019 (1989). The first execution order was set for March 23-30, 1990.

Lonchar refused to bring any appeals on his convictions or sentence. As such, his sister, Chris Lonchar Kellogg [hereinafter "Kellogg"] brought a habeas corpus petition in the Superior Court of Butts County. Following a hearing into the matter, that court found Lonchar competent to waive his appeals. The Superior Court of Butts County then denied the motion for stay of execution and refused to allow Kellogg to proceed as next-friend.

The Supreme Court of Georgia dismissed the application for certificate of probable cause to appeal that decision. Kellogg v. Zant, 260 Ga. 182, 390 S.E.2d 839 (1990). The Supreme Court denied certiorari. Kellogg v. Zant, 498 U.S. 890, reh'g denied, 498 U.S. 1008 (1990).

A petition for habeas was then filed in this Court. This Court found that an evidentiary hearing into Lonchar's competency was required. Accordingly, the Court conducted a three-day hearing. Evidence, including various psychiatric opinions and evaluations of Lonchar and questioning of Lonchar by the Court, was considered.

The Court found Lonchar competent to waive his appeals. Specifically, the Court found that Lonchar understood his position and his options; that no evidence of significant psychotic episodes, substantial distortion of reality, bipolar disease or other mental disease of Lonchar was present in the record; and that

even though Lonchar suffered from depression and personality disorders, these problems did not affect his ability to rationally choose among his options. The Court consequently denied Kellogg standing to bring the next-friend petition. Lonchar v. Zant, Civil Action No. 1:90-CV-2336-JTC (Feb. 20, 1992). The Eleventh Circuit affirmed this Court's opinion. Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992). Certiorari was denied in the Supreme Court on February 24, 1993. Lonchar v. Zant, 113 S.Ct. 1378 (1993). Clemency was denied that same day by the State Board of Pardons and Paroles.

On February 24, 1993, the date of Lonchar's scheduled execution, Lonchar consented to the filing of a habeas petition in his case. A stay of execution was granted.

The habeas petition was assigned to the Honorable Kristina Cook-Connelly, Judge of the Superior Court of Butts County. Before a hearing was set down, Lonchar wrote letters dated September 13, 1993 and May 5, 1994 to the Judge indicating that he wished to fire his attorneys and withdraw his petition. Lonchar mailed similar letters to the Attorney General's Office in July of 1993.

A hearing was held on June 23, 1994. The Court questioned Lonchar and found him competent to withdraw his petition. The Court granted his request to dismiss the petition and to fire his attorneys on January 25, 1995. The dismissal of the petition was without prejudice. A Motion for Reconsideration, filed by Lonchar's former attorneys, was denied on February 23, 1995.

Lonchar's former attorneys next filed an Application for

Certificate of Probable Cause to Appeal. The Supreme Court of Georgia denied that application on April 6, 1995. A Motion for Reconsideration was filed, and was denied on May 4, 1995. On that same day, the Court also granted the State's Motion to Issue the Remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 7, 1995, Lonchar hired attorney John Matteson to represent him.

A new execution order was signed on June 8, 1995. The execution window was established between the dates of June 23, 1995 and June 30, 1995. The Department of Corrections has set the date and time for the execution as 3:00 p.m. on June 23, 1995.

A next-friend petition was filed in the Superior Court of DeKalb County by Lonchar's brother, Milan. On June 20, 1995 Judge Mallis ruled that Milan Lonchar lacked standing to proceed. On June 22, 1995, the Supreme Court of Georgia affirmed this ruling.

On June 20, 1995, a habeas petition challenging Lonchar's competency was filed in the Superior Court of Butts County. A hearing was held on June 21, 1995. That Court denied Milan Lonchar standing to proceed as next-friend. On June 22, 1995, the Supreme Court of Georgia denied the Certificate of Probable Cause and the Motion for Stay of Execution in this action.

On June 22, 1995, this Court denied Milan Lonchar's next-friend habeas petition for lack of standing. The Eleventh Circuit affirmed on June 23, 1995.

On June 23, 1995, Larry Lonchar filed a full petition for

writ of habeas corpus in the Superior Court of Butts County. A short hearing was held. On June 26, 1995, Judge Smith of the Superior Court of Butts County denied the writ, based on a procedural bar and did not consider the merits of the petition. A motion for reconsideration was denied on June 27, 1995. The Supreme Court of Georgia affirmed on June 27, 1995.

Larry Lonchar has now filed a petition for writ of habeas corpus in this Court.

II. FINDING OF FACTS

This Court held an evidentiary hearing to allow the parties to present evidence upon issues raised in Respondent's Motion to Dismiss. The parties agreed that the record before the Court also consists of the record in the next-friend petition filed on behalf of Lonchar (Lonchar v. Zant, Civil Action No. 90-CV-2336-JTC), the transcripts of hearings held in the State court habeas proceedings and orders entered in the State habeas proceedings. Based upon this record, the Court makes the following findings of fact.

Larry Lonchar is aware of the prior history of this litigation which is detailed in the Statement of the Case. Lonchar participated in an extensive evidentiary hearing held in the next-friend case in this Court. Id. The Court questioned Lonchar and found as follows:

> Mr. Lonchar understands his options clearly: that federal habeas corpus is the last opportunity for him to obtain review of his sentence; that there are substantial arguments that his sentence should be overturned; and

that failure to pursue this option will result in his execution.

The Court concluded that Mr. Lonchar was competent to waive further review of his sentence, knowingly and voluntarily waived further review, and dismissed the next-friend petition on February 13, 1993.

Lonchar's execution was scheduled for February 24, 1993. Lonchar's attorney, Mr. Clive Stafford-Smith told Lonchar shortly before the execution that his brother would kill himself if the execution were carried out. As a result, Lonchar filed a petition in state court minutes before the scheduled execution.

Petitioner soon decided to withdraw the petition and wrote the state court judge requesting to dismiss his petition. He first requested that the petition be dismissed on September 13, 1993 in letters to the Judge. The state court entered an order dismissing the petition on January 25, 1995.

Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to do so. He was aware of the potential legal arguments and their factual predicates. Not only did he decline to pursue further review of his sentence, on at least three occasions he knowingly and voluntarily waived further review of his sentence in open court.

The execution was rescheduled for June 23, 1995. On June 20, 1995, his brother brought another next friend petition. Again

Lonchar declined to participate. Both the State and Federal courts dismissed the petition because of the lack of evidence that Lonchar was incompetent to make this decision. The Eleventh Circuit Court of Appeals decision was entered of June 23, 1995.

Within hours of his execution, Lonchar for the second time filed an application for writ of habeas in the State Courts. He agreed to file the petition after Mr. Stafford-Smith and his other attorneys advised him that the legislature might change the law to allow a different method of execution so that he could donate his organs.

The present petition is the first brought by Lonchar in Federal Court.

Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

III. CONCLUSIONS OF LAW

Lonchar files this habeas petition seeking review in this Court of possible constitutional errors arising from his trial and death sentence.

As a general rule, a district court shall entertain an application for a writ of habeas corpus by a person in the State's custody pursuant to the judgment of the State court if that application alleges federal constitutional errors. 28 U.S.C. § 2254.

In its Motion to Dismiss, Respondent raised the defense of abuse of the writ. The writ of habeas corpus is an equitable remedy, Gomez v. United States District Court, 112 S.Ct. 1652, 1653 (1992), which provides "a means by which the legal authority under which a person is detained can be challenged." Wright, Miller & Cooper, Federal Practice & Procedure § 4261 (1988).

The abuse of the writ doctrine arose as an equitable response to successive applications because res judicata principles are inapplicable to habeas corpus cases. McCleskey v. Zant, 111 S.Ct. 1454, 1463 (1991); Darden v. Dugger, 825 F.2d 287, 293 (1987), cert. denied, 485 U.S. 943 (1988). The doctrine is incorporated into Rule 9(b):

> second or successive petition[s] may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that the failure to the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9 (b), Rules Governing § 2254 Cases. Thus under the abuse of the writ doctrine, a habeas petitioner may be denied review of his alleged constitutional errors where successive writs are filed. "Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass or delay." Sanders v. United States, 373 U.S. 1, 18 (1963).

Under the abuse of the writ doctrine the State must plead an abuse of the writ with particularity. McCleskey v. Zant, 111 S.Ct. 1454 (1991). This burden is satisfied where the State notes

the petitioner's prior writ history, identifies the claims which appear for the first time, and alleges that petitioner has abused the writ. Id. at 1456. The State, in this instance, has met that burden.

The State has shown that despite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, in the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims. In this petition, Lonchar brings the same claims, with the exception of the claim on the method of execution, that have been brought in the prior next-friend petitions.

Further, the State alleges that Lonchar brings these claims solely for the purpose of delay. That allegation is supported by Lonchar's own testimony at the evidentiary hearing conducted in this case,

Once the State meets its burden, the burden shifts to the Petitioner to explain the reasons that make it "fair and just for the Court to overlook the delay." McCleskey, 111 S.Ct. at 1464. Petitioner must show "cause -- e.g. that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim -- as well as actual prejudice resulting from the errors of which he complains." Id. at 1456-57.

Lonchar fails to come forward with either objective or

subjective reasons to excuse the conduct.[1] Lonchar previously had the opportunity to obtain collateral review of all the present issues and voluntarily declined to do so. Petitioner's reason for not raising the claims asserted in his habeas petition sooner are that he has just recently been convinced that he may be able to do some good by offering his organs for donation following his execution. This is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lonchar's failure to raise these issues earlier is certainly inexcusable negligence, if not voluntary abandonment.

The rule which authorizes dismissal for abuse of the writ, however, only applies to successive petitions. See McCleskey, 111 S.Ct. 1454; Rule 9(b). The Court has been unable to find any case where petitioner's first petition for habeas corpus seeking review of constitutional errors in the federal courts has been dismissed for abuse of the writ.

The present petition is the first habeas petition filed in federal Court by Lonchar personally. The issue then is whether a first federal habeas petition filed at the eleventh hour for the purpose of delay and resulting from inexcusable negligence in not seeking earlier review can be dismissed as an abuse of the writ.

The purposes of the abuse of the writ doctrine would be served by affording full effect to the doctrine in this instance. One of the law's objects is finality of judgments. McCleskey, 111

[1] The Court has considered the proffer of evidence put on by Lonchar, as well and his testimony in making this determination.

S.Ct. at 1468. Allowing manipulation of the system defeats this interest. Disrespect for the judicial system arises when manipulation of the system is allowed to endlessly extend the appeals so that there is no finality. Further, without finality, no deterrent effect flows from the penalty. McCleskey, 111 S.Ct. at 1468. Finally, deference to the State's enforcement of its laws is validated by adhering the abuse of writ doctrine where this degree of manipulation has been observed.

Despite strong policy and equitable reasons which support the doctrine, the Eleventh Circuit's holding in Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987) indicates it does not apply to a first petition. In that case, the Eleventh Circuit reversed the District Court's ruling that there was an abuse of a writ on a first habeas petition where the abuse arose from the intentional delay of filing of the writ until just prior to the execution. The Eleventh Circuit determined that the petition could not be dismissed under the traditional abuse of the writ doctrine embodied in Rule 9(b) because that rule is expressly limited to successive writs. Id. at 1518. The Court determined that a first petition could not constitute a successive writ. Id.

Rule 9(b) of the Rules Governing § 2254 Cases codifies the common law concerning abuse of the writ, as was stated in Sanders v. United States, 373 U.S. 1 (1962). Neither the Rule nor the common law allow application of the doctrine where there is no successive petition.

For that reason, although the Court finds that

Petitioner's conduct otherwise constitutes an abuse of the writ, since it is a first petition, the Court feels constrained to deny the Motion to Dismiss based on abuse of the writ.

IV. CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss on the above ground is **DENIED**. Petitioner's Motion for Stay of Execution is **GRANTED**; Petitioner's Motion for Evidentiary Development is **DENIED AS MOOT**.

SO ORDERED, this 28 day of June, 1995.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

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